pose but I would not in any case go into matters of this kind on a summons for construction. The question does not however arise as I consider that this is a case where the gift is for the benefit of the donees alone, i.e. the residuary legatees, in which case they can claim the gift without applying it to the purpose indicated (see Jarman, 7th Ed. page 857). As there will be sufficient to pay the other legacies and annuities, this means in effect that this legacy will not be payable except as part of the residue.

It appears that the trust funds consist of $136,900 invested and a small sum of cash. The investments include $129,000 Singapore Municipal 5% Debenture Stock.

The various questions raised by the summons will be answered as follows:—

As to question (1) and (2), it will be declared that the sum of $500 payable monthly to Tan Ger Siam from Chop Yong Ngiap was an annuity payable to her which ceased on her death.

As to question (3), it will be declared that the legacy of $10,000 to Low Chin Piow was a trust for ancestral worship and the gift fails as tending to a perpetuity and also being for superstitious uses.

The direction to the trustees to apply $50,000 towards building a house in China can be disregarded as the residuary legatees are absolutely entitled to the sum and can expend it as they like.

The residuary legatees would prefer to retain the capital intact and the annuities to the two surviving wives will therefore be provided for by transferring to a separate account the sum of $100,000 5% Singapore Municipal Debentures, the surplus income being transferred to the general account of the suit. The sums of $5,000, $4,000 and $4,000 referred to in para 3 (a), (c) and (d) of the summons will be provided by transferring Singapore Municipal Debentures to these amounts to separate accounts, the income being in the meantime payable to the general account.

The costs of all parties of this application must be taxed as between solicitor and client and paid out of the general fund, investments being sold so far as necessary for this purpose. The Order of Court providing for the payment of $150 to the three infant defendants must be discharged but they can apply for maintenance if necessary out of the income or capital of their several shares. There will be a declaration that the testator's five sons and the adopted son are entitled to the residue equally between them. The adult beneficiaries can apply for payment of their interests in such part of the corpus as remains over after making the transfers indicated above.

Solicitors for the parties:—*1. Battenberg & Talma. 2. Drew & Napier. 3. Rodyk & Davidson. 4. John G. Campbell & Co. 5. Claude da Silva.*

[ORIGINAL CIVIL JURISDICTION]

LEE SENG HENG and OTHERS.....Plaintiffs

v.

GUARDIAN ASSURANCE COMPANY, LIMITED.....Defendants

[SINGAPORE SUIT No. 4 of 1932]

Insurance—Ordinance No. 51 (Arbitration) S. 5—cancellation of Policy—validity of notice of loss—sufficiency of verbal notice—the Post as a means of communication—authority of agent—condition precedent—waiver—estoppel.

An option to determine a fire policy in order to be valid should be communicated to the addressee. Where it was reasonably clear from the circumstances that the parties contemplated the use of the post as a means of communication and the plaintiffs subsequently ratified that method of communication adopted by the defendants, the cancellation of the contract was effected at the time the option was posted, even though it never reached its destination.

A verbal notice of claim, though in the absence of express stipulation for a written one, is valid if communicated to the Insurance Company. Where, however, notice was given verbally to the clerk of the Company who had no discretion in the matter and there was an express provision in the Policy for written notice,

Held, the verbal notice was insufficient.

Clause 11 of the Policy reads as follows:—

"On the happening of any loss or damage the Insured shall forthwith give notice thereof to the Company, and shall within 15 days after the loss or damage, or such further time as the Company may in writing allow in that behalf deliver to the Company

(a) A claim in writing for the loss and damage containing as particular an account as may be reasonably practicable of all the several articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, having regard to their value at the time of the loss or damage, not including profit of any kind.

(b) Particulars of all other Insurances, if any. The Insured shall also at all times at his own expense produce, procure and give to the Company all such further particulars, plans, specifications, books, vouchers, invoices, duplicates or copies thereof, documents, proofs and information with respect to the claim and the origin and cause of the

fire and the circumstances under which the loss or damage occurred, and any matter touching the liability or the amount of the liability of the Company as may be reasonably required by or on behalf of the Company together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith. No claim under this Policy shall be payable unless the terms of this condition have been complied with."

Held further, that as the provisions of this clause which constituted a condition precedent were not complied with, the action failed.

Action tried before Murison, C.J.

Claim by Chop Lian Guan & Company who carried on business at Nos. 1 and 3 Buloh Kasap a small village some five miles from Segamat, Johore, for loss under a policy of fire insurance upon the plaintiffs' stock-in-trade household goods and furniture which were destroyed by fire on the 1st day of April 1931.

The writ was issued on January 5th, 1932 and the defendants entered appearance on the 13th of January 1932.

On the 19th of February, 1932 the defendants applied under Section 5 of Ordinance No. 51 (Arbitration) for a stay of proceedings pending reference to arbitration. At the hearing of the summons Mr. Justice Sproule ordered two preliminary issues to be tried as to the liability of the defendants. The issues came on for trial before the Chief Justice. As practically the whole substance of the claim was raised by these, the parties agreed to treat the proceedings as the trial of the action.

The facts and arguments sufficiently appear from the Judgment.

Knowles, for the Plaintiffs.

Williamson, for the Defendants.

Cur. ad. vult.

MURISON, C. J. The plaintiffs in this case sue the Defendants for $12,000 alleged to be due upon a Policy of Fire Insurance.

The writ is dated the 5th January, 1932 and the Defendants entered an appearance on the 13th January, 1932.

Upon the 19th February 1932 the Defendants applied by summons for a stay of proceeding in the action under Section 5 of Ordinance No. 51 (Arbitration).

Upon the 26th February, 1932 Mr. Justice Sproule ordered that the following two preliminary issues be tried:—

1. As to whether the assured have complied with clauses 11 and 13 of the Policy of Insurance dated the 4th day of February, 1931: and, if not,
2. Whether the Defendants are liable under the said policy.

The summons was only a summons to determine whether the agreement for arbitration excluded an action. The issues go far beyond this matter and raise practically the whole substance of the claim. It was therefore agreed by the parties that subject to the question of *quantum* and without prejudice to the right of appeal the proceedings before me be treated as the trial of the action. The question of agreement for arbitration was not argued at all before me.

The facts of the case are not in dispute.

The plaintiffs, before the occurrence of the fire in this case, carried on business under the style of Chop Lian Guan & Company, and occupied (*inter alia*) two houses, Nos. 1 and 3 Buloh Kasap which is (or was) a small village some five miles from the town of Segamat in Johore.

Upon the 4th February, 1931 the Plaintiffs insured their stock in trade etc. with the Defendants against fire for the sum of $12,000. The period of insurance was from the 6th February, 1931 to the 6th February, 1932.

The insurance was effected through one Tan Kin Watt, the Defendants' agent at Malacca. The 1st Plaintiff paid the premium on the 5th March and a receipt of that date was given to him by the agent.

On the 1st April, 1931 the said stock in trade etc. was wholly destroyed by fire.

The 1st plaintiff at the time was in Singapore. Upon the 2nd April he went to Buloh Kasap and found the shops or houses burnt out and still smoking.

Upon the 3rd April he went to Malacca to the Defendants' agent's place of business. The agent was not there, and it may as well be said

at once that (although neither the plaintiffs nor the Defendants at this time knew it) he had disappeared early in March. The 1st Plaintiff then on the 3rd April gave verbal notice of his loss to the agent's clerk. In the evening he returned to Buloh Kasap. As he received no word from the agent, the 1st Plaintiff went again to Malacca on the 11th or 12th April and saw the clerk again. The agent was not there.

The 1st Plaintiff returned to Buloh Kasap and upon hearing nothing from the agent at Malacca wrote to the Company in Singapore on the 19th April, 1931 giving formal notice of his loss by fire (page 2 of Exhibit A, the agreed correspondence).

The Defendants' agents in Singapore (Messrs. Paterson Simons & Company) on the 20th April asked for further particulars of the Plaintiffs' loss and these on the 21st May (*sic*) were furnished by the Plaintiffs' solicitors.

The Defendants' solicitors on the 22nd May replied that they were making enquiries about the claim. In answer to the Plaintiffs' letter of the 6th June the Defendants' solicitors again replied on the 12th June that they were still making enquiries. Further enquiries by the Plaintiffs on the 22nd June and 27th June resulted in the letter of 2nd July from the Defendants' solicitors saying that upon the date of the fire the Policy of Insurance had ceased to exist because on the 27th March previous they had written to the Plaintiffs cancelling the policy. They enclosed a copy of the letter.

It may be remarked here that this cancellation was based upon clause 10 of the Policy which is as follows:

> "The Insurance may be terminated at any time at the request of the Insured, in which case the Company will retain the customary short period rate for the time the Policy has been in force. The Insurance may also at any time be terminated at the option of the Company, on notice to that effect being given to the Insured, in which case the Company shall be liable to repay on demand a rateable proportion of the premium for the unexpired term from the date of the cancelment."

The letter of the 27th March (p. 17A in Exhibit A) which cancelled the policy is important. Its contents are as follows:—

> **"Guardian Assurance Company, Limited.**
> (Incorporated in England).
> Head Office:
> 68, King William Street, London, E.C. 4.
> Established 1821.
>
> Singapore, 27th March, 1931.
>
> Chop Lian Guan & Co.,
> Nos. 1 & 3, Buloh Kasap,
> Segamat.
>
> Dear Sirs,
>
> **"Guardian" Policy No. 6913255—Due 6/2/32**
> **Covering Stock in Trade.**
>
> We are unable to trace having received the premium on the above policy and we take this opportunity of informing you that unless you can produce documentary evidence to the contrary, the risk is not insured.
>
> It may be that you have, in fact, paid the premium, in which case we hereby give you formal notice in accordance with Condition No. 10 of your Policy that the insurance is cancelled as from 4 o'clock in the afternoon of the date of this letter.
>
> On receipt of the cancelled policy, we will have pleasure in forwarding to you a *pro rata* return premium for the unexpired term of the insurance.
>
> Yours faithfully,
> For Paterson Simons & Co., Ltd.
> Sd. Illegible."

With regard to this letter it was at first contended before me that the envelope was wrongly addressed but, upon production of the original (Exhibit D) it was agreed that the address (Buloh Kasap) was that given by the Plaintiffs on the Policy itself and was in fact the correct address.

The letter was never received by the Plaintiffs and the reason of that was as follows. There was no post office at Buloh Kasap which was a small village of some 27 houses. The nearest post office was at Segamat and the daily delivery from Segamat did not extend to Buloh Kasap. The practice at Segamat was to send a postman to Buloh Kasap only when the amount of correspondence justified a special journey. Now the letter of 27th March, which was addressed to the

Plaintiffs at Buloh Kasap, was kept at Segamat, according to the practice stated above, until the 2nd April when the postman took it to Buloh Kasap. As the Plaintiffs' premises had (with practically the whole village) been burnt down, the addressee could not be found. A further effort at delivery was made on the 7th April but it was ineffectual. So the letter was ultimately returned to the writer in Singapore (See page 25 of Exhibit A).

I now deal in order with the various arguments of Mr. Knowles for the Plaintiffs.

The first argument was that there had been no legal rescission of the contract of insurance (which admittedly existed on the 26th March, 1931) by the letter of the 27th March. Such notice under Clause 10 of the Policy, he says, cannot be valid unless and until it is actually communicated to the addressee. He quotes *Henthorn* v. *Fraser* (1892) 2 Ch. 27, *Byrne* v. *Van Tienhaven* (1880) 5 C.P.D. 344 at page 348 and *Stevenson* v. *Maclean* (1880) 5 Q.B.D. 346. He contended that there was no trade usage in this Colony to the effect that the post was an accepted method of commercial communication.

With regard to this latter contention that the Plaintiffs never authorised the use of the post office as a medium of communication, I take the law to be (as Farwell J. in *Bruner* v. *Moore* (1904) 1 Ch. at page 316 took it to be) what Lord Herschell laid down the law in *Henthorn* v. *Fraser* at page 33 thus: "Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as the means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted."

Now *Bruner* v. *Moore* was a question concerning the exercise within a certain time of an option to purchase patent right. This is precisely the position here. The Defendants had —in fact each party had—under the policy an option to determine the policy. The cases cited by Mr. Knowles are cases on the revocation of an offer which had already been accepted and so could not be revoked. These cases are not I think in point. But the principle that acceptance by post, where the use of the post can be said to be in the contemplation of the parties, bounds the addressee is common to Mr. Knowles' cases and to our present case. Farwell J. decided this in *Bruner* v. *Moore*. He also decided that the exercise by post of an option contained in a contract was upon the same footing as an acceptance of an offer by post. The only point of difficulty was whether the parties could be said to have assented to the post as their agents. One was in London and the other in Paris and he found that the contract obviously contemplated that the post, in regard to the option, could be used as a means of communication. He, therefore, held that the posting of a letter exercising the option was a proper exercise of the option as from the date of posting.

The only point, therefore, left for me to decide is whether the post was properly used here as an agent by the Defendants in sending their letter of the 27th March. The Plaintiffs acted from Buloh Kasap five miles from Segamat which is some 125 miles from Singapore and some 50 miles from Malacca. It is difficult to see how they were ordinarily to communicate if not by post. It is true that the 1st Plaintiff went personally two or three times to Malacca from Buloh Kasap, but that does not displace the post as a reasonable means of communication. In the *Household Insurance Company* v. *Grant* (1876) 4 Exch. Div., 216 at page 223 the Court inferred authority of the post as agent from the distance (Swansea and London) between the parties. See *Henthorn* v. *Fraser* at pages 32 and 33 (Lord Herschell). And, in fact, after the letter of the 27th March the parties here exchanged thirty-four letters (Exhibit A) by post: which would seem to be a ratification of the method of communication by post adopted by the Defendants on the 27th March. The matter to my mind is very plain. I hold as Farwell J. did in *Bruner* v. *Moore*, that "the parties in this case contemplated that the post might be used as a means of communicating on all subjects connected with the contract." In these circumstances it is clear that the sender of the letter is not responsible for any delay in the post (*Dunlop* v. *Higgins* (1848) 1 H.L.C. at p. 399 top).

I hold, therefore, that the rescission of the policy was effected at the moment that the letter of the 27th March was posted, that is on the 27th March, 1931, and that the policy was non-existent at the date of the fire on the 1st April, 1931.

It will be convenient to take next Mr. Knowles' argument that the Plaintiffs gave valid notice of their loss.

The relevant provisions of the Policy in regard to this are as follows:—

Clause 11. "On the happening of any loss or damage the Insured shall forthwith give notice thereof to the Company, and shall within 15 days after the loss or damage, or such further time as the Company may in writing allow in that behalf, deliver to the Company

(a) A claim in writing for the loss and damage containing as particular an account as may be reasonably practicable of all the several articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, having regard to their value at the time of the loss or damage, not including profit of any kind.

(b) Particulars of all other Insurances, if any.

The Insured shall also at all times at his own expense produce, procure and give to the Company all such further particulars, plans, specifications, books, vouchers, invoices, duplicates or copies thereof, documents, proofs and information with respect to the claim and the origin and cause of the fire and the circumstances under which the loss or damage occurred, and any matter touching the liability or the amount of the liability of the Company as may be reasonably required by or on behalf of the Company together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith.

No claim under this Policy shall be payable unless the terms of this condition have been complied with."

Clause 20. "Every notice and other communication to the Company required by these conditions must be written or printed."

Mr. Knowles' contention is:

(a) that the notice of the 3rd April to the clerk was, in the circumstances notice to the agent;

(b) that notice to the agent was notice to the Company;

(c) that the verbal notice given on the 3rd April even though the policy required writing was sufficient, and

(d) that in any event the written notice upon the 19th April was sufficient even though the policy required notice of loss forthwith and notice of particulars in 15 days.

With regard to (a) one must remember that this point only concerns a verbal notice and assumes that written notice is not essential. It is only on that basis that the point can be considered at all. The general rule is *delegatus non potest delegare*, but there are exceptions. These are conveniently collected in Bowstead on Agency, 7th edition at pages 109-110, and the cases there cited. See also Chitty on Contract, 18th edition, page 266, and the cases cited in note (e). I think the principle cited as No. (4) in Bowstead might apply here: *i.e.* that an unforseen emergency had rendered the delegation a matter of necessity. Even apart from this it is very difficult for the Defendants, after appointing an agent who disappears, to claim any benefit from the fact that notice was given only to a clerk and not to agent who had disappeared. In my opinion notice to the clerk was notice to the agent. But that is not all. It seems that even where notice to the agent is good the assured takes the risk of the notice not being sent on (as was the case here) to the principal. See Welford and Otter-Barry on Fire Insurance, 3rd edition page 269 note (n) referring to a report which is not in our library. It seems therefore that after all the notice never having been communicated to the Defendants, is, for that reason, bad.

As to (b), this point also can only be considered on the basis that verbal notice, as distinguished from written notice, is sufficient. The clause in the policy seems to insist on notice to the Company itself, but I think *Gale* v. *Lewis* (1846) 9 Q.B. 730 is a sufficient authority for

saying that notice to the agent who issued the policy is notice to the principal. But again as the notice was never communicated to the principal this cannot avail the plaintiffs anything in view of the overriding principle quoted just above, namely, that where (as here) the notice of loss was never communicated to the principal the risk lies upon the assured. There was therefore in my opinion no valid notice to the Company because the notice was never communicated to the Defendants.

As to (c) the point is that the policy (clauses 11 and 20) requires written notice of the loss. The question is whether verbal notice in these circumstances is good. Writing can be waived, but I hesitate to say that the clerk in this case was the agent of the Company to the extent of being able to waive the need for written notice. I do not think he had such discretion nor do I think anyhow that either he or the Company ever did waive it. As regards the main question, namely, whether verbal notice is sufficient where the contract requires written notice, I can find no case precisely in point though in *Hawthorne's Case* (1862) 31 L.J. Ch. 625 a verbal notice was held good on the ground that no special form of notice was prescribed. This case supports the statement in Welford and Otter-Barry at page 269 that verbal notice is good only in the absence of an express stipulation for written notice. Further, the general principles applicable to a condition precedent seem to support the same view. I hold, therefore, that in this case verbal notice was bad and that the claim, therefore fails.

As to (d), this is of importance if the view I have taken of the invalidity of the verbal notice is correct . The point here is first that the written notice as a notice of loss dated the 19th April was 18 days, or anyhow some days, late because it should have been given forthwith; and, secondly, that the notice as a notice of claim was bad because it was three days late, *i.e.* it arrived on the 19th April, whereas it should have arrived on or before the 16th, *i.e.* within fifteen days after the fire.

The question whether the notice of the 19th was good or not in point of time turns upon the question whether the provisions in the policy were a condition precedent or not. (Welford and Otter-Barry, page 270). If they were, the notice is bad: if not, it was good.

A mere stipulation for notice within a certain time is not in itself a condition precedent (*Stoneham* v. *Ocean, etc. Co.* (1887) 19 Q.B.D., 237. But the last words of clause 11 are noticeable. They say "No claim under this policy shall be payable unless the terms of this condition have been complied with."

A side issue arises here in regard to a question of waiver.

Upon receipt of the letter of the 19th April the Defendants' agents Messrs. Paterson, Simons & Company, wrote on the 20th asking for particulars. It may be that this could be set up as a waiver of the lateness of the receipt of notice, but the letter (page 3 of Exhibit A) is headed "Without prejudice" and is admittedly included in error in the agreed correspondence. It is, therefore, not admissible in evidence.

I return, therefore, to general principles. Whether a particular stipulation is intended to be a condition precedent or not is a question of intention and it is stated in Welford and Otter-Barry pages 115-6 that where there is a stipulation saying that non-fulfilment of a condition shall disentitle the assured from recovery, the intention of the parties is clearly shown and the stipulation must be construed to be a condition precedent.

Apart from this the case of *Roper* v. *Lendon* (1859) 1 E. & E. 825 is a direct authority that the notice and particulars must be sent within the time prescribed in the policy. The clause in that case is the same as the clause in this case.

Upon this authority I conclude that there was here a condition precedent which was not fulfilled and that on this point the claim must fail.

The last argument addressed to me by Mr. Knowles was on the question of estoppel. This substantially was rested upon the ground of laches by the Company who were responsible for not stating their grounds of objection to payment sooner. There was, in fact, delay on this point (See pages 6 to 9 of Exhibit A) but the grounds for the delay were not unreasonable and I do not see where the Plaintiffs were prejudiced. The delay did not prejudice the Plaintiffs in regard

to giving notice because the Plaintiffs' efforts were confined to giving only verbal notice which I have held bad. It may be that, if the Plaintiffs had known sooner that the Defendants refused to pay, they might have sued the absconding agent and recovered something from him, but it appears that the agent was prosecuted in June and there is no evidence that he had any substantial assets at whatever earlier date the refusal to pay ought to have been communicated.

I do not think there is any substance in this argument.

One point remains. Clause 13 of the Policy says that " if the claim be made and rejected, and an action or suit be not commenced within three months after such rejection.....all benefit under this Policy shall be forfeited."

The claim here was rejected on the 2nd July, 1931 and the writ in the action is dated the 5th January, 1932, nearly six months after the rejection of the claim.

It would appear, therefore, that the action must fail upon this ground. I refer to Welford and Otter-Barry page 306 and the Australian and New Zealand cases cited in note (r). There is no copy of these reports in our library, but they clearly support the Defendants' case here.

Briefly, therefore, my conclusions upon the whole case are as follows. (1) The contract claimed upon was non-existent at the date of the writ. (2) No valid notice of the loss was ever given to the Defendants because first the verbal notice to the agent (even if verbal notice were enough) was never sent to the Defendants and, secondly, the written notice was too late to comply with the conditions precedent in clause 11 of the Policy. (3) The action was commenced out of time.

I, therefore, dismiss the action with costs.

Solicitors for the Plaintiffs, *Braddell Brothers.*

Solicitors for the Defendants, *Drew & Napier.*

[ORIGINAL CIVIL JURISDICTION]

IN RE ENA MOHAMED TAMBY DECEASED.
OOMAH MEIDA BINTE HAJEE.....Plaintiff.
v.
MOONA JANA SHAIK ALLAUDIN and OTHERS ..... Defendants.

IN FORMA PAUPERIS No. 270 of 1931.

Practice & Procedure.—Pauper litigant—compromise without leave of Court—Civil Procedure Code, S. 3 effect of alteration of English rule on Local Rule.

Hare Spinning Co. v. Leigh, not followed.

In this action the plaintiff sued in forma pauperis to recover possession of certain immoveable property in Singapore belonging to her deceased husband.

After the action had been set down for hearing it was alleged by some of the defendants that the action had been settled by the parties without the intervention of their respective Solicitors. The Defendants moved the Court to have the action stayed or dismissed by reason of the alleged compromise. This motion was resisted on the ground:—

(1) that as the plaintiff was suing in forma pauperis no compromise could be entered into between the parties without the leave of the Court and

(2) that there was, in fact, no settlement.

The motion came on for hearing before Whitley, J.

Williamson for the plaintiff contended that as no provision was made in the Civil Procedure Code as to whether or not a pauper litigant could enter into compromise the English practice in such matters should be followed and that section 3 of the Civil Procedure Code enabled the Court to look to the English practice.

Smith for the defendants contended that section 3 of the Civil Procedure Code must be read with regard to the decision in *Hare Spinning Company* v. *Leigh* 88, L.J., Ch. 124 and that it was clear that a pauper litigant could in England up to 1921 compromise a suit without leave and that the alteration of the rule did not affect the law here, the Civil Procedure Code having been passed before the introduction of the rule in England.

Williamson in reply. The decision in the *Hare Spinning Company* v. *Leigh* (supra) can be distinguished. Section 3 of our Civil Procedure Code differs from the rule mentioned in that case. Furthermore the Court had power to make its own rules so as to introduce any alteration. Our Civil Procedure Code can only be altered by passing an amending Ordinance.

Held, that the effect of section 3 of the Civil Procedure Code should not be read as limited by the decision of *Hare Spinning Company* v. *Leigh*, 88 L.J. Ch., p. 124 and that the procedure in force in England should be adopted and that accordingly a pauper litigant could not enter into a compromise without leave of the Court.

[APPELLATE CIVIL JURISDICTION]

WESTERHOUT v. ALKAFF.

SINGAPORE SUIT No. 595 of 1931.

APPEAL No. 2 of 1932.

Defective Memorandum of Appeal. Section 1132 Civil Procedure Code.

Appeal from Supreme Court to Court of Appeal.

Singapore, 20th June, 1932.

In a Memorandum of Appeal the points of law or fact which are alleged to have been wrongly decided must be set out specifically.

On an appeal from the Judgment of the Supreme Court the memorandum set out the following reason for appeal namely:—

"(1) The learned Judge's finding that $4,000 was due to the Plaintiff from the Defendants is wrong in law and in fact. There was no evidence whatever on which such a finding could be based."

(A second reason for appeal dealt with the question of costs only).

The Appeal came on for hearing before Murison, C.J., Burton, J.. and Terrell, J.

Laycock (for the Respondent) took a preliminary objection that the Memorandum of Appeal was defective in that it did not specify the points of law or fact alleged to have been wrongly decided in accordance with Sec. 1132 of the Civil Procedure Code. He submitted that it is not sufficient to state that the Judgment is wrong in law or that the Judgment is wrong in fact and referred to the notes to Sec. 1132 in the 3rd Edition of Van Someren's book on the Civil Procedure Code; also to Order 59 r. 10 and *Pfeiffer* vs. *The Midland Railways Co.*, 18 Q.B.D p. 243.

Page contra submitted that memorandum was sufficient.

The Court unanimously upheld the objection and gave the Appellants leave to amend the grounds of objection.

MUNICIPALITY AND COMPENSATION.

A case of considerable interest came on recently before Mr. G. C. Dodd, the District Judge and First Magistrate, sitting in his special Jurisdiction under S. 362 of the Municipal Ordinance to deal with a compensation claim. The claim was made under S. 129 of the Ordinance by an owner of land who complained that his land had been damaged by the construction right through the land of a large drain. There appears to be no record of any previous litigation concerning a claim of this nature. At the trial and before Judgment Counsel for the Municipal Commissioners contended that there was no appeal from any Judgment of the District Judge. Counsel for the Claimant did not admit this and suggested that there might be a way of bringing the matter before the Supreme Court by *writ of certiorari.*

The Claimant however was successful; whereupon Counsel for the Municipal Commissioners began to think more highly of the prerogative *writ of certiorari*, and Counsel for the Claimant on the other hand doubted the soundness of his previous views on the question of appeal! In fact no attempt at appeal has yet been made. We intend to publish the Judgment in full in our next issue. Mr. John Laycock appeared for the Claimant and the Hon. Mr. A. P. Robinson appeared for the Municipal Commissioners.

LIST OF JUDGES & LAW OFFICERS OF THE CROWN.

SINGAPORE.

Judges:
The Hon. Sir J. W. MURISON, Kt.B., K.C., Chief Justice, S.S.
The Hon. Mr. Justice P. J. SPROULE, (on leave).
The Hon. Mr. Justice N. H. P. WHITLEY.
The Hon. Mr. Justice A. K. A BECKETT TERRELL.

Attorney-General, S.S:
The Hon. Mr. W. C. HUGGARD, K.C. (on leave).
The Hon. Mr. C. V. MILLS, (acting).

Solicitor-General:
J. H. PEDLOW, ESQ., (acting).

Deputy Public Prosecutor:
P. A. MCELWAINE, ESQ., K.C.

Registrar, Supreme Court:
W. A. NOEL DAVIES, ESQ.

Deputy Registrar, Supreme Court & Sheriff:
LIM KOON TECK, ESQ.

Deputy Registrar, Supreme Court:
C. F. ESS, ESQ.

PENANG.

Judge:
The Hon. Mr. Justice H. W. PRICHARD, K.C.

Registrar:
W. C. TAYLOR, ESQ., M.C.S.

Deputy Registrar, Supreme Court:
TAN HOCK ANN, ESQ., (acting).

Deputy Public Prosecutor:
L. B. GIBSON, ESQ., (acting).

MALACCA.

Registrar:
H. C. WILLAN, ESQ.

KUALA LUMPUR.

Judges:
The Hon. Sir L. H. ELPHINSTONE, Kt.B., K.C., Chief Justice, (on leave).
The Hon. Mr. Justice W. H. THORNE, (Acting Chief Justice).
The Hon. Mr. Justice N. D. MUDIE.

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CONTENTS.

	PAGE
THE CHIEF JUSTICE, S. S.	Frontispiece
NOTES:—	
COSTS ON APPEAL TO THE PRIVY COUNCIL	27
COURT OF CRIMINAL APPEAL ..	27
MEANING OF GAMING INSTRUMENTS	28
F. M. S. SUPREME COURT RULES ..	29
A CORRECTION	29
PUBLICATION RECEIVED	29
COMMENT ON FAILURE OF PRISONER TO DISCLOSE DEFENCE AT POLICE COURT	29
THAM HING KWAI v. STATE OF NEGRI SEMBILAN & ORS.	31
TAN SOO (f) v. FREEMAN & MADGE ..	42
HAJI ABDUL LATEEF BIN HAJI TAMBY & ORS. v. HAJI TAIB BIN HAJI ASHIM & ORS.	46
TAN HO CHER TRADING, ETC. v. YEO POH, ETC.	48
IN RE H. E. CORDEIRO	51
SHAIK SAHIB BIN OMAR, ETC. v. THE MUNICIPAL COMMISSIONERS	53
TAN HONG TEE v. P. & O. BANKING CORPN.	57
LOW SOON WAH v. LOW PENG SOY. ..	58

NOTES.

Costs on Appeal to the Privy Council.

It is the invariable rule that on appeal to the Court of Appeal an undertaking is given by the Respondent's Solicitor to repay the costs awarded to him by the Court below in the event of the appeal being successful. This is the rule as far as it applies to the Court of Appeal. In the case of an appeal to the Privy Council the rule is different; on such an appeal it has never been the practice to give such an undertaking in respect of costs awarded to the Respondent either in the Court of Appeal or the Court below. In this respect the Court has always followed the English practice with respect to appeals to the House of Lords. See *Barker* v. *Lavery* 14 Q.B.D. 769 (C.A.) *Schwappes Ltd.* v. *Gibbens* 1904 W. N. 208 (C.A.) and other cases cited in Annual Practice at page 1265 of 1932 edition. The matter has however recently been before the Courts in three cases, viz.

1. *S. V. S. Muthuraman Chettiar* v. *E. Kong Guan & anor.* (Malacca Suit No. 36 of 1925)
2. *S. S. T. Sockalingam Chettiar* v. *Shaik Sahied bin Abdullah Bajerai* (Singapore Suit No. 1448 of 1930)
3. *Tan Hong Tee & Co.* v. *P. & O. Banking Corporation* (Singapore Suit No. 329 of 1931)

We report the third case elsewhere in this issue.

We do not think it necessary to report the two other cases fully as this case is a decision of the full Court of Appeal whereas the two previous cases are decisions of a single judge sitting as the Court of Appeal. The effect of these cases is that if very exceptional circumstances can be shown the Court will order a stay in default of an undertaking to refund being given. In the case before the full Court of Appeal (*Tan Hong Tee's* case) the exceptional circumstances alleged were that the Respondent was in difficult circumstances and therefore would not be able to comply with any order of the Privy Council as to payment or refund of costs (cf. *Barker* v. *Lavery* above). In the case of *S. V. S. Muthuraman Chettiar* v. *E. Kong Guan & anor.* the exceptional circumstances alleged were that the Plaintiff Respondent was resident out of the jurisdiction and had no fixed assets in the Colony.

* * * *

Court of Criminal Appeal.

The necessity for the establishment of a final appellate tribunal where errors of law and miscarriage of justice in criminal cases may be corrected and rectified led to the passing on 1st August 1931, after a period of hectic agitation, of Ordinance No. 5 of 1931 (The Court of Criminal Appeal). Since then there appears to have been a lull after the storm. It is surprising that

interest in so vital a subject should have flagged. It may be noticed that the Registration of United Kingdom Designs Ordinance an ordinance of considerably less importance passed in about the same time has already come into force. The result of the neglect in providing the safeguards of justice can well be imagined. The institution of a criminal appeal Court is long overdue. It is time that the public be stirred up from lethargy lest such beneficent legislation may be relegated to oblivion.

A brief survey of the principal provisions may not be out of place for a proper understanding of the importance of the ordinance.

The Court shall consist of not less than three judges and of an uneven number of judges with the Chief Justice as the president.

An appeal may be lodged (1) against a conviction on any ground which involves a point of law (2) with leave of the Court of Criminal Appeal or upon a certificate of the trial judge as to fitness of the case for appeal, against a conviction on any ground which involves a question of fact or of mixed law and fact and (3) with the leave of the Court, against any sentence.

In cases where the appellant, though not properly convicted on some part of the charge but properly convicted on some other part of the same charge, the Court has power, under Section 7, to affirm the sentence or pass such other sentence instead. It is further provided that where an appellant has been proved to be guilty of an offence other than that with which he was charged, the Court has discretion to pass such sentence in substitution for the sentence passed at the trial as may be warranted in law, but not a sentence of greater severity.

Section 8 deals with the disposal of property on conviction. In ordinary cases the operation of an order relating to the disposal of property under Sections 415, 416, 417, 419 or 420 of the Criminal Procedure Code shall be suspended until the expiration of 10 days after the date of conviction. In cases where notice of appeal or leave to appeal within 10 days after the date of conviction is given the operation of such order shall be suspended pending appeal. These provisions are not applicable to cases in which there is an order to the contrary. Notwithstanding that the conviction is not quashed, the appeal court may annul or vary any order for the disposal of any property.

Notice of appeal or notice of application for leave to appeal must be given within 10 days of the date of conviction. Such time may be extended by the Court of Criminal Appeal. Within the time limited for appealing no sentence of death or corporal punishment shall be executed The Court of Criminal Appeal shall have additional powers to order production of any document or attendance of any compellable witnesses who were or were not called at the trial. The Court may receive the evidence of competent, though not compellable, witnesses and appoint a special commissioner to investigate and examine complicated accounts. Any person with special expert knowledge may be appointed to act as assessor to the Court in cases for the determination of which expert knowledge is required.

Under Section 12 an advocate and solicitor may be assigned to an appellant who has not sufficient means to enable him to prosecute the appeal.

No costs are allowed to either side in proceedings under the Ordinance.

The prerogative of mercy vested in the Governer in Council shall not be affected by any proceedings under the Ordinance. The Governor in Council may, nevertheless, refer any case to the Court of Criminal Appeal to be heard and determined, or obtain their opinion on any point arising in the case in respect of which a petition for the exercise of His Majesty's mercy has been presented.

* * * * * *

Meaning of Gaming Instruments.

In the case of *Emperor* v. *Pyarilal*, I.L.R. 56 Bom. 192 it was held by Beaumont, C.J. and Broomfield, J. that where a sub-Inspector of Police gave marked coins to his informer and the informer went into the shop of the accused person and gambled with the marked coins and subsequently the marked coins were found in the shop where a search was made by the Police, such coins were instruments of gaming.

F.M.S. Supreme Court Rules.

The Rule Committee appointed under the Rule Committee (Supreme Court) Enactment, 1930, has completed 1932, Rule No. 1.

This Committee was appointed for the following purposes:—

(*a*) for regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the Court of Appeal and the Court of a Judge respectively in all civil suits, matters and proceedings whatsoever in or with respect to which those Courts respectively have for the time being jurisdiction (including the procedure and practice to be followed in the Registries or offices of the Supreme Court) and any matters incidental to or relating to such procedure or practice including (but without prejudice to the generality of the foregoing provision) the manner in which and the time within which any applications which under any Enactment are to be made to the Court of Appeal or the Court of a Judge shall be made;

(*b*) for regulating and prescribing the procedure on appeals from any Court or person to the Court of Appeal or the Court of a Judge to an inferior Court;

(*c*) for regulating any matters relating to the costs of proceedings in the Court of Appeal or the Court of a Judge;

(*d*) for prescribing the powers and duties of officers of the Supreme Court.

Rule No. 1 was approved by Resolution of the Federal Council on the 4th July, 1932 and will come into operation from the 1st August 1932.

This rule prescribes the procedure as to pleadings and will apply to all proceedings taken in the Supreme Court of the Federated Malay States on or after the 1st August 1932 in all civil suits and matters then pending.

Special attention is drawn to proceedings under Section 471 of the Civil Procedure Code to which sub-rules 7—46, (both inclusive) shall apply only to the extent to which are set forth in the said rules.

Form No. 161 in the Third Schedule to the Code is amended.

It is to be noted that the following provisions of the Civil Procedure Code shall cease to apply to proceedings in the Supreme Court, as from the 1st August 1932, viz., Sections 55 (i), 59, 60, 61, 62, 87, 93 J, 93 K, and Form 115 in the Third Schedule thereto, except as provided in Rule 42 (ii) Section 93 L thereof.

Under Rule 44 the procedure is laid down for acts which shall ordinarily be performed by the Registrar.

There is also a schedule of forms to be used under the above rule.

A pertinent question may be asked whether the Civil Procedure and Practice of Johore which is adopted under the Courts Enactment of 1920 from the F.M.S. Civil Procedure Code is affected by the introduction of the above Rule.

A CORRECTION.

We regret that, through a misprint, the name of the Hon'ble Mr. Justice Gerahty appeared in the List of Judges and Law Officers of the Crown in our last as "Gerhaty". We are informed that His Lordship is a K.C. As corrected, the name of His Lordship should read "The Hon'ble Mr. Justice C. C. Gerahty, K.C."

PUBLICATION RECEIVED.

We have received a copy of the excellent book by The Hon'ble Mr. Justice A. K. a Beckett Terrell, Judge of the Supreme Court of the Straits Settlements, on Malayan Legislation and its Future, published by Malaya Publishing House Limited at the price of $2.50 per copy. A review of the work will appear in the next issue.

COMMENT ON FAILURE OF PRISONER TO DISCLOSE DEFENCE AT POLICE COURT.

An important decision as to the propriety of comments in a summing-up on the failure of an accused person to disclose his defence at the preliminary hearing before the magistrates was recently given by the Court of Appeal in *Rex* v. *Naylor* (174 L.T. p. 227) says the Law Times of 7th May, 1932.

In this case the prisoner was charged with shopbreaking and larceny, and at the police court, in answer to the statutory formula read out to

an accused person at the conclusion of the prosecution's case, the appellant said: "I don't wish to say anything as I am innocent."

When the case came before the quarter sessions, the recorder, in his summing-up to the jury, commented adversely on the fact that the accused had failed to disclose his defence at the preliminary hearing before the magistrate. The Court of Criminal Appeal quashed the conviction on the ground that such comments were improper.

This case is of extreme importance to all persons who are called upon to administer the criminal law or to take part in its administration.

It is not uncommon to find in practice that counsel adversely comment on the fact that a prisoner did not disclose his defence at the earliest possible moment or at the police court, and on occasion such adverse comments are made from the Bench in the course of a summing-up.

The decision of the Court of Criminal Appeal in *Rex* v. *Naylor* would appear to lay down the law clearly as being that such comments, whether by counsel or by judges, on the failure of an accused person to disclose his defence earlier, would be highly improper, and if made, might be a ground for subsequently quashing the conviction.

Rex v. *Naylor* would also seem to be of extreme importance on the further ground that there does not appear to be any other previous authority exactly in point.

The nearest case is the case of *Rex* v. *Whitehead* (139 L.T. Rep. 640; (1929) 1 K.B. 99, at p. 102), but there the point turned on the question of corroboration.

In *Rex* v. *Whitehead* the prisoner was charged with unlawful carnal knowledge of a girl under sixteen years of age. When the prisoner was charged by the police officer he, after being duly cautioned that he need not say anything in answer to the charge unless he wished to do so, but that whatever he said would be taken down in writing and might be given in evidence, said: "I don't wish to say anything now." In summing-up to the jury the learned judge directed the jury that the silence of a person accused of a crime, and his failure to make any answer or show any indignation might be corroboration, but whether it was so in a particular case was a matter for the jury to decide. The learned judge, after referring to what took place on the prisoner being charged, told them that if they thought that the failure of the prisoner to make a denial when the charge was sprung upon him by the police officer corroborated the evidence of the girl, then they would probably more readily accept her evidence as being corroborated to that extent.

The Court of Criminal Appeal, however, quashed the conviction on the ground, *inter alia*, that the above summing-up was improper. In his judgment Lord Hewart, C. J., put the matter thus: "In order that evidence may amount to corroboration it must be extraneous to the witness who is to be corroborated. A girl cannot corroborate herself, otherwise it is only necessary for her to repeat her story some twenty-five times in order to get twenty-five corroborations of it.... It would seem that what he (Humphreys, J.) said was intended only to be introductory to what he subsequently told the jury, namely, that the jury were entitled to say that the fact that the appellant when charged did not make any denial of the charge amounted to corroboration of the girl's story, notwithstanding that the police officer, when he read the charge over to the appellant, gave him a warning that he need not say anything in answer to the charge unless he wished to, but that whatever he said would be taken down in writing and might be given in evidence. To say that silence after such a warning may be treated as corroboration of the evidence of the prosecutrix appears to us to be a misdirection."

The Court of Criminal Appeal applied, or rather extended, the principle of the case to the facts in *Rex* v. *Naylor*, and they considered that the silence of an accused person, or his failure to disclose his defence, upon having the statutory formula, which contains a similar warning, read out to him by the magistrate at the close of the case of the prosecution, could not be adversely commented on by the judge in his summing-up. And if such adverse comments may not be made by a judge *a fortiori*, they may not be made by counsel, and, if made by counsel by inadvertence, it would seem to be the duty of the judge to correct any impression that might thereby have been wrongly made in the minds of the jury.